

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JAMES R. WELDEN, as personal  
representative for the estate of JAMES W.  
WELDEN, SR., and the estate of JAMES W.  
WELDEN, SR.,

Plaintiffs,

v.

NOVA ORTHO-MED, INC.,

Defendant.

Case No. C11-2099RSL

ORDER GRANTING IN PART  
DEFENDANT’S MOTION FOR  
DISPOSITIVE AND  
MONETARY SANCTIONS

This matter comes before the Court on Defendant’s “Second Motion for Dispositive and Monetary Sanctions” (Dkt. # 60). Defendant Nova Ortho-Med, Inc. (“Defendant”) seeks dismissal of Plaintiff James Welden’s (“Plaintiff”) claims against it as a sanction for Plaintiff’s counsel’s repeated failures to investigate the facts underlying his client’s claims. Defendant also seeks monetary sanctions in an amount sufficient to reimburse it for the unnecessary expenses it incurred as a result. In response, Plaintiff contends that this Court should adopt the “least drastic remedy,” which consists of Plaintiff’s production of witness declarations and Plaintiff’s agreement to pay certain costs incurred by Defendant and to allow Defendant to depose recently disclosed witnesses.

1 Having reviewed the memoranda, declarations, and exhibits submitted by the  
2 parties, the Court finds as follows:

## 3 II. DISCUSSION

### 4 A. Background

5 This is Defendant's second motion for dispositive and monetary sanctions. In  
6 November 2012, the Court granted in part Defendant's first motion for sanctions based  
7 on Plaintiff's counsel's failure perform a minimal factual inquiry before filing suit and  
8 before certifying that his discovery responses were accurate. Dkt. # 52. Until the end of  
9 discovery, Plaintiff maintained that the walker at the heart of this products liability  
10 action was donated to his father, Mr. Welden, by a Lion's Club. Dkt. # 27 at 20-21.  
11 One month before the close of discovery, Plaintiff's counsel informed Defendant's  
12 counsel that Mr. Welden's neighbor, Richard Delmonte, purchased the walker from a  
13 pharmacy at Mr. Welden's request. Therefore, despite Plaintiff's earlier representations,  
14 the walker was new when Mr. Welden received it. Id. at 36-37. The Court declined to  
15 dismiss the case at that time, but granted Defendant's request to continue the trial date  
16 so Defendant could conduct additional discovery related to this new information. The  
17 Court also awarded Defendant the costs and fees it incurred in bringing the motion.  
18 Dkt. # 52.

19 In December 2012, while the parties' summary judgment motions were pending,  
20 the Court learned that yet another version of the facts had recently come to light. Dkt. #  
21 57 at 1-3. Defendant's counsel was scheduled to depose Richard and Diane Delmonte  
22 on a Monday. The Friday night before the scheduled depositions, Plaintiff's counsel e-  
23 mailed Defendant's counsel asking him to cancel the depositions because it turned out  
24 that Mr. Delmonte did not actually purchase the walker for Mr. Welden. Id. at 7.

25 Therefore, Plaintiff's counsel suggested, there was no need to proceed with the  
26 depositions. Id. In exchange for agreeing to cancel the depositions, Plaintiff's counsel

1 offered “the name of a witness with first-hand information concerning how the walker  
2 came into the deceased’s possession and stipulate to his deposition and being called as a  
3 witness on that subject.” Id. The Court struck the pending summary judgment motions  
4 and held a status conference on January 10, 2013. Dkt. # 58.

5 During the status conference, counsel for Plaintiff explained that Mr. Welden’s  
6 son, Plaintiff’s brother, gave Mr. Welden the walker. He found the used walker at a  
7 hospice organization with which he volunteered. In light of this development, the Court  
8 struck the trial date, held the remaining deadlines in abeyance, and invited Defendant to  
9 file a second motion for sanctions. Dkt. # 59.

## 10 **B. Analysis**

11 Federal courts have inherent power to impose sanctions in response to abusive  
12 litigation tactics. “Dismissal is an available sanction when ‘a party has engaged  
13 deliberately in deceptive practices that undermine the integrity of judicial proceedings’  
14 because ‘courts have inherent power to dismiss an action when a party has willfully  
15 deceived the court and engaged in conduct utterly inconsistent with the orderly  
16 administration of justice.’” Leon v. IDX Sys. Corp., 464 F.3d 951, 958 (9th Cir. 2006)  
17 (quoting Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337, 348 (9th Cir.  
18 1995)). Dismissal may be appropriate where a pattern of deception makes it impossible  
19 for a court to ensure that the truth will be available at trial. Valley Eng’rs Inc. v. Elec.  
20 Eng’g Co., 158 F.3d 1051, 1057 (9th Cir. 1998). “There is no point to a lawsuit, if it  
21 merely applies law to lies.” Id. at 1058.

22 In deciding whether to dismiss a case as a sanction under its inherent power, the  
23 Court considers “(1) the public’s interest in expeditious resolution of litigation; (2) the  
24 court’s need to manage its dockets; (3) the risk of prejudice to the party seeking  
25 sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the

1 availability of less drastic sanctions.” Leon, 464 F.3d at 958 (quoting Anheuser-Busch,  
2 Inc., 69 F.3d at 348).

3 The first two factors, the public’s interest in expeditious resolution of litigation  
4 and the court’s need to manage its dockets, weigh in favor of dismissal. Yourish v. Cal.  
5 Amplifier, 191 F.3d 983, 990 (9th Cir. 1999). This case has lingered for a year and half  
6 and no trial date is currently set. See Dkt. # 1; Dkt. # 59. Therefore, the first factor  
7 favors dismissal. The second factor also weighs in favor of dismissal. Trial has already  
8 been rescheduled once due to Plaintiff’s counsel’s failures to comply with Rule 26.  
9 Dkt. # 52. The possibility of rescheduling trial again could disrupt the Court’s schedule.

10 The third factor the Court must consider is prejudice to Defendant. When  
11 considering potential prejudice to Defendant, the Court examines “whether the  
12 plaintiff’s actions impair the defendant’s ability to go to trial or threaten to interfere  
13 with the rightful decision of the case.” Malone v. U.S. Postal Serv., 833 F.2d 128, 131  
14 (9th Cir. 1987). As part of its analysis, the Court balances the prejudice to Defendant  
15 and the strength of Plaintiff’s excuse for default. Id.

16 Defendant argues that Plaintiffs’ every-changing story threatens to interfere with  
17 the rightful decision in this case because there have been many conflicting sworn  
18 statements regarding the condition and source of the walker. Dkt. # 60 at 6. It further  
19 argues that the delay resulting from Plaintiff’s actions impairs its ability to proceed to  
20 trial. Id. In opposition, Plaintiff focuses on Defendant’s opportunities to cross-examine  
21 witnesses at trial and present the prior inconsistent statements to the jury. Dkt. # 62 at  
22 9. According to Plaintiff, whether the walker came from a hospice organization or the  
23 Lion’s Club makes little difference; “in both cases it is a used walker maintained by a  
24 charitable organization and loaned to the decedent.” Id. at 8.

1 As for his excuse, Plaintiff's counsel contends that he did not inquire as to the  
2 source of the walker earlier because "a products liability claim may be established  
3 regardless of privity and regardless of whether Mr. Welden was even an owner, much  
4 less the first owner of the walker." Id. at 1. While it may be true that a plaintiff can  
5 succeed on certain claims under the Washington Product Liability Act ("WPLA") as the  
6 second user of a product, a plaintiff who receives a used product as a gift generally  
7 cannot establish a breach of warranty claim under the WPLA. Thongchoom v. Graco  
8 Children's Products, Inc., 117 Wn. App. 299, 307 (2003) (lack of privity between buyer  
9 and seller of baby walker precluded recover for breach of warranty). Plaintiff's counsel  
10 acknowledged the significance the source of the product may have in his December 20,  
11 2012, letter to Defendant's counsel explaining that Plaintiff intended to withdraw his  
12 breach of warranty claim based on the recent development. Dkt. # 61 at 12 ("In light of  
13 these declarations, we expect to drop our allegation of breach of warranty and will  
14 entertain other changes." ).<sup>1</sup> Thus, Plaintiff's stated reason for failing to inquire as to the  
15 source of the walker does little, if anything, to tip the scales against dismissal.

16 Of particular concern to the Court is Plaintiff's counsel's conduct after he  
17 uncovered new information inconsistent with his previous representations. For instance,  
18 upon learning that Mr. Delmonte did not in fact purchase the walker, Plaintiff's  
19 counsel's offered to provide the name of the witness with information about the source  
20 of the walker in exchange for Defendant's counsel's agreement to cancel the depositions  
21 of the Delmontes. This threat to withhold information to which Defendant's counsel is  
22 entitled conflicts with the nature and purpose of the Federal Rules of Civil Procedure  
23 and this Court's Local Rules. E.g., Fed. R. Civ. P. 26(e) (requiring a party to timely  
24 supplement a disclosure or discovery response if the party learns that the disclosure or

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25 <sup>1</sup> Despite Plaintiff's offer to withdraw his breach of warranty claim, the Court has not  
26 received a notice of withdrawal.

1 response is incorrect in a material respect); LCR 26(f) (“The rule is intended to promote  
2 the just, efficient, speedy, and economical determination of every action and proceeding  
3 and to promote, wherever possible, the prompt resolution of discovery disputes without  
4 court intervention. Counsel are expected to cooperate with each other. . . to facilitate  
5 the exchange of discoverable information, and to reduce the costs of discovery.”).

6 Equally worrisome to the Court is Plaintiff’s counsel’s willingness to submit  
7 conflicting declarations signed by the same witnesses. When Plaintiff’s counsel learned  
8 that Mr. Welden’s neighbor purchased the walker, he submitted a declaration signed by  
9 Mr. Delmonte supporting that version of events. Dkt. # 48-1. Then, when he learned  
10 that the walker was a gift from Mr. Welden’s son, Plaintiff’s counsel did not hesitate to  
11 obtain contradictory declarations supporting that version. Dkt. # 61 at 12-23. The  
12 apparent ease with which Plaintiff’s counsel offers conflicting sworn declarations casts  
13 serious doubt on whether his future submissions will be truthful if the proceedings  
14 continue.

15 The fourth factor, public policy favoring disposition on the merits, generally  
16 weighs against dismissal. Wanderer v. Johnston, 910 F.2d 652, 656 (9th Cir. 1990).  
17 Here, the public has an interest in whether Defendant manufactured an unsafe product.  
18 The Court therefore finds that this factor supports a denial of dispositive sanctions.

19 Finally, turning to the fifth factor, there are a number of less drastic sanctions  
20 available to the Court. Malone, 833 F.2d at 132 n.1. For example, the Court could  
21 reopen discovery to allow Defendant to conduct additional discovery regarding Mr.  
22 Welden’s acquisition of the walker. The Court could strike Plaintiff’s breach of  
23 warranty claim. The Court could also impose another monetary sanction on Plaintiff’s  
24 counsel. The issue is whether these lesser sanctions or a combination thereof will allow  
25 Defendant to adequately prepare for trial and ameliorate the risk that Plaintiff’s conduct

1 will interfere with the rightful determination of this case. Adriana Int'l Corp. v.  
2 Thoeren, 913 F.2d 1406 (9th Cir. 1990). The availability of lesser sanctions that target  
3 Plaintiff's counsel's conduct weighs against dismissal.

4 In light of Plaintiff's counsel's conduct after being sanctioned once by the Court,  
5 the clear relevance of the information, and the Court's concern regarding Plaintiff's  
6 counsel's conflicting representations to the Court, the Court finds a severe sanction  
7 including the award of monetary sanctions necessary.

### 8 **III. CONCLUSION**

9 For all of the foregoing reasons, it is hereby ORDERED that:

10 (a) Plaintiff's breach of warranty claim is STRICKEN. The striking does not  
11 preclude Defendant from presenting evidence regarding the conflicting explanations of  
12 Mr. Welden's acquisition of the walker.

13 (b) Monetary sanctions in the amount of \$10,000 will be awarded to offset the  
14 excess costs caused by Plaintiff's counsel's failure to investigate and validate facts  
15 underlying his client's claim, to punish unacceptable behavior, and as a deterrent to  
16 future bad conduct. Plaintiff's counsel shall, within seven days of the date of this Order,  
17 pay \$10,000 to Defendant through its attorney. Again, the Court finds that Plaintiff is  
18 not responsible for his counsel's misconduct.

19 (c) Defendant may conduct additional discovery regarding the origin and  
20 condition of Mr. Welden's walker. The Court will issue a separate scheduling order  
21 setting a new trial date and reopening discovery for Defendant only.

22 DATED this 5th day of July, 2013.

23 

24 Robert S. Lasnik  
25 United States District Judge